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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FREIGHTLINER CORPORATION,

Petitioner,

vs.

BEN MYRICK AND EMILY MYRICK,

Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,

Petitioner,

vs.

JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

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37 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
IDENTITY AND INTEREST OF AMICUS CURIAE 1
SUMMARY OF THE ARGUMENT 2
ARGUMENT 3
INTRODUCTION 3
I. CONGRESS IN THE MOTOR VEHICLE ACT DID NOT PREEMPT STATE LIABILITY FOR INJURY CAUSED BY UNREASONABLY DANGEROUS VEHICLES. 6
A. The Motor Vehicle Act Does Not Contain a Clear and Unambiguous Statement of Congressional Intent to Preempt State Common Law Remedies 6
1. *This Court has established a strong presumption against preemption of state tort law which would leave victims without access to justice.* 6
2. Express preemption of any state "safety standard" does not clearly indicate congressional intent to eliminate state product liability law. 8
3. Section 1397(k) expressly preserves common law liability. 10
B. Express Preemption of State Regulatory "Safety Standards" Does Not Preempt State Product Liability Actions. 11
1. The indirect incentive for safety resulting from tort liability is fundamentally different from direct administrative safety regulation. 11
2. The statement in Garmon on the regulatory effect of tort liability does not transform product liability into a safety standard. 14

II. THE VEHICLE ACT DOES NOT OUST PRODUCT LIABILITY THROUGH "CONFLICT" PREEMPTION. 16

A. Where Congress Has Made Express Provision for the Preemptive Scope of a Statute, Courts May Not Disregard Congressional Intent to Imply Broader Preemption. 16

B. State product liability law is not in conflict with FMVSS 211 18

1. It is not impossible for manufacturers to comply with both FMVSS 211 and state liability rules. *18*

2. State product liability does not conflict with the federal "option" to use antilock brakes. 20

C. Product Liability Does Not "Stand As An Obstacle" To The Purposes And Objectives of the Vehicle Act. 20

III. CONGRESS LACKS THE AUTHORITY TO PREEMPT THE COMMON LAW RIGHT OF ACCESS TO JUSTICE FOR REDRESS OF WRONGFUL INJURY 22

A. Affording the Right to Seek Redress for Injury Is a Core Function of the States. 23

B. The Tenth Amendment Withholds From Congress the Authority to Close State Courts to Those Seeking Redress for Wrongful Injury. 25

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985). 10

Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54, 468 U.S. 491 (1984) . 15

Burke v. Dow Chemical Co., 797 F. Supp. 1128 (E.D.N.Y. 1992) 11

California Federal Savings and Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987) 6, 10, 20, 22

Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992) 7, 8, 9, 14

Coleman v. Thompson, 111 S. Ct. 2547 (1991) 3

Consolidated Rail Corp. v. Smith, 664 F. Supp. 1228 (N.D. Ind. 1987) 8

Dimick v. Schiedt, 293 U.S. 474 (1953) 24

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) 27

English v. General Elec. Co., 110 S. Ct. 2270 (1990).. 6, 7, 13

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 26

Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir. 1984) 11, 19

Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 7

FMC Corp. v. Holliday, 111 S. Ct. 403 (1990) 7

Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985) 17, 28

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) *14*

Gregory v. Ashcroft, 111 S. Ct. 2395 (1991) 9, 17, 29

Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) 27

Hernandez-Gomez v. Leonardo, 1994 WL 593202 (Ariz., Nov. 1, 1994) 11

Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985) 21

Hines v. Davidowitz, 312 U.S. 52 (1941) 21

Ingraham v. Wright, 430 U.S. 651 (1977) 23

International Paper Co. v. Ouellette,

479 U.S. 481 (1987) 21, 22
Jones v. Rath Packing Co., 430 U.S. 519 (1977) 7
Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988) 25
Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968) 19
Lucas v. United States, 757 S.W.2d 686 (Tex. 1988) 25
Mack v. United States, 856 F. Supp. 1372 (D. Ariz. 1994) 29
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 23
Meyer v. Nebraska, 262 U.S. 390 (1923) 24
Missouri Pacific Ry. Co. v. Humes, 115 U.S. 512 (1885) 23
Moore v. City of East Cleveland, 431 U.S. 494 (1977) 18
Moore v. Mobile Infirmary Assoc., 592 So. 2d 156 (Ala 1991) 25
Myrick v. Freuhauf Corp., 13 F.3d 1516 (11th Cir. 1994) 5
National League of Cities v. Usery, 426 U.S. 833 (1976) 27, 28
New York v. United States, 112 S. Ct. 2408 (1992) 29
Paccar v. NHSTA, 573 .2d 632 (9th Cir. 1978) 19
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 25
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 6
Pritz v. United States, 854 F. Supp. 1503 (D. Mont. 1994) 29
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) *27*
Puerto Rico Dept. of Consumer Affairs v. Ilsa Petroleum Corp, 485 U.S. 495 (1988) 20
Raymond v. Riegel Textile Corp, 484 F.2d 1025 (1st Cir. 1973) 19
Rice v. Santa Fe Corp., 331 U.S. 218 (1947) 7
Rucker v. Norfolk & Western R.R., 396 N.E.2d 534 (Ill. 1979) 19
San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959) 14, 28
Schneidewind v. ANR Pipeline Co., 108 S. Ct. 1145 (1988) 7
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 7, 8, 13, 19
Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987) *25*

Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989) 25
Stevens v. Parke, Davis & Co., 507 P.2d 653 (Cal. 1973) 19
Taffet v. Southern Co., 930 F.2d 847 (11th Cir. 1991) 10
Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989) 9
United Construction Workers v. Laburnum Const. Co., 347 U.S. 656 (1954) 8, 16
United States v. Bass, 404 U.S. 336 (1971) 7
Will v. Michigan Dept. of State Police, 109 S. Ct. 2304 (1989) *10*
Wood v. General Motors Corp., 673 F. Supp. 1108 (D. Mass. 1987) *15*

Constitutions, Statutes, and Rules

U.S. Const., amend. IX 26
U.S. Const., amend. X 26
15 USC § 1381 3
15 USC § 1391(2) 4
15 USC § 1392(a) 3
15 USC § 1392(d) 4, 8
15 U.S.C. §1397(k) 4, 10
49 C.F.R. §571.122 4
FMVSS 121 ..... 4, 18, 20
S. Rep. No. 1301, 89th Cong. 2d Sess. 4

Other Authorities

Barbara A. Atwell, *Products Liability and Preemption: A Judicial Framework*, 39 Buff. L. Rev. 181 (1991) 5
Richard C. Ausness, *Federal Preemption of State Products Liability Doctrines*, 44 S.C.L. Rev. 187 (1993) 5
Richard C. Ausness, *Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems*, 39 Syracuse L. Rev. 897 (1988) 13
Guido Calabresi, The Costs of Accidents (1970) 12
Coke, Second Institute 55-56 (4th ed. 1671) 23

Philip H. Corboy and Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption*, 15 Am. J. Tr. Adv. 435 (1992) ... 5
Marc Z. Edell & Cynthia A. Walters, *The Doctrine of Implied Preemption In Products Liability Cases: Federalism in the Balance*, 54 Tenn. L. Rev. 603 (1987) ... 5
Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U.L. Rev. 579 (1981) ... 24
Ronald D. Rotunda, *Sheathing the Sword of Federal Preemption*, 5 Const. Commentary 311 (1988) ... 5
Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L. Rev. 142 (1991) ... 24
Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Studies 357 (1984) ... 12
Kenneth Starr, et al., The Law of Preemption: A Report of the Appellate Judges Conference of the American Bar Association (1991) ... 10, 18, 30
Frank J. Vandall, *Undermining Torts' Policies: Products Liability Legislation*, 30 Am. U. L. Rev. 673 (1981). 12
Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 Hastings Const. L.Q. 69 (1988) ... 5
Note, *Constitutional Guarantees of a Certain Remedy*, 49 Iowa L. Rev. 1202 (1964) ... 24

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from both parties granting consent to the filing of this brief have been filed with this Court.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyers primarily represent injured

plaintiffs in civil actions. State law has traditionally afforded a remedy in tort by which victims may seek fair compensation from wrongdoers.

Increasingly, those who may be defendants in state tort actions seek refuge in the doctrine of federal preemption. In too many instances, immunity from state law is urged by those whose objective is immunity from any accountability, where Congress has not provided for meaningful alternative regulation and remedies. Preemption would result in failure of government in one of the most fundamental obligations to its citizens -- the right to legal recourse for injury.

SUMMARY OF THE ARGUMENT

This is a case about federalism and access to justice. Congressional intent is the touchstone of preemption, and the lower court correctly looked no further than the two express preemption provisions of the National Motor Vehicle Safety Act.

The Vehicle Act does not preempt product liability causes of action. Preemption of any state "safety standard" plainly indicates that Congress intended to preempt only state administrative regulations. Moreover, Congress clearly preserved common law liability in a savings clause.

Petitioners' assertion of "conflict" preemption independent of congressional intent runs counter to established precedent. Moreover, such a rule would invite judges to assume policymaking responsibilities that belong to Congress and would undermine principles of federalism. In addition, the authorities relied upon by Petitioners do not support conflict preemption here, since they involved subjects of federal, rather than traditional state interests, or did not result in leaving claimants wholly without remedy.

Even if Congress had intended to preempt state tort remedies, it lacks the authority to do so. The right to seek legal remedy for wrongful injury is a fundamental right, and affording that remedy is a core function of the states in our federal system. Petitioners would accord Congress the power not only to regulate vehicle safety, but to do so in a manner which dictates to the states their tort rules and requires them to close their courthouse doors to victims who would otherwise be entitled to seek legal recourse. The Tenth Amendment precludes the federal government from "commandeering" state courts in that manner.

ARGUMENT

INTRODUCTION

Like an increasing number of cases that have come to this Court, this "is a case about federalism." *Coleman v. Thompson*, 111 S. Ct. 2547, 2552 (1991).

The issue before this Court is easily stated. The Court's resolution, however, will determine whether the doors to the state courthouse, which have provided access to justice for those seeking remedy for legal wrongs, shall at last be shut against the thousands of persons injured each year by unreasonably dangerous products that are the subject of federal regulation.

In an effort "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. §1381, Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 [herinafter the Vehicle Act]. The Vehicle Act authorizes the Secretary of Transportation to "establish by order appropriate Federal motor vehicle safety standards," 15 U.S.C. §1392(a), defined as "a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which

is practicable, which meets the need for motor vehicle safety and which provides objective criteria." 15 U.S.C. §1391(2).

Among these is FMVSS 121, establishing performance requirements for air-brakes. As amended, FMVSS 121 provided that the standard's mandatory stopping distances -- which manufacturers claimed would require installation of antilock devices -- "are not applicable to trucks and trailers." See 49 C.F.R. §571.121.[1]

Congress addressed the preemptive effect of the Vehicle Act in two separate sections:

> **Supremacy of federal standards . . .**
> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish or continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the federal standard.

15 USC § 1392(d).

> **Continuation of common law liability**
> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

15 U.S.C. §1397(k).[2]

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[1]Amicus adopts and respectfully refers the Court to the extensive history of FMVSS 121 set out in the Counterstatement of Facts in Respondent's Brief.

[2]*See also* S. Rep. No. 1301, 89th Cong. 2d Sess. at 14, 1966 U.S.C.C.A.N., at 2720: "Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law."

The consolidated cases before this Court arise out of an injury and a death allegedly due to Petitioners' failure to equip their trucks with antilock devices. The lower court, relying on §1397(c), held that plaintiffs' product liability causes of action under state law were not preempted. *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994).

Two essential characteristics of the statute define the preemption issue for this Court: Federalism and access to justice. First, the subject matter of the Vehicle Act, protection of the health and safety of the public, is one that has been traditionally the responsibility of the states. Second, the statute itself provides no redress or compensation to the victims of dangerous vehicles: Preemption of their state causes of action would leave injured victims entirely without any alternative legal remedy. These factors have been critical in many of this Court's preemption decisions.[3]

This Court has clearly marked a path for lower courts in addressing preemption of state tort law that reflects both appropriate deference to Congress and due regard for the role

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[3]In recent years, commentators have recognized that preemption of state product liability causes of action raise serious federalism issues. *See* Richard C. Ausness, *Federal Preemption of State Products Liability Doctrines*, 44 S.C.L. Rev. 187 (1993); Philip H. Corboy and Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption*, 15 Am. J. Trial Adv. 435, 450-52 (1992); Barbara A. Atwell, *Products Liability and Preemption: A Judicial Framework*, 39 Buff. L. Rev. 181 (1991); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 Hastings Const. L.Q. 69 (1988); Ronald D. Rotunda, *Sheathing the Sword of Federal Preemption*, 5 Const. Commentary 311 (1988); Marc Z. Edell & Cynthia A. Walters, *The Doctrine of Implied Preemption In Products Liability Cases: Federalism in the Balance*, 54 Tenn. L. Rev. 603 (1987).

of the states in the federalist system. The lower court, amicus submits, did not stray from that path.

I. CONGRESS IN THE MOTOR VEHICLE ACT DID NOT PREEMPT STATE LIABILITY FOR INJURY CAUSED BY UNREASONABLY DANGEROUS VEHICLES.

A. The Motor Vehicle Act Does Not Contain a Clear and Unambiguous Statement of Congressional Intent to Preempt State Common Law Remedies.

1. This Court has established a strong presumption against preemption of state tort law which would leave victims without access to justice.

Federal law preempts state law, as this Court has emphasized on numerous occasions and in a broad variety of statutory settings, only where Congress so intends. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987)(congressional intent is the "ultimate touchstone" for preemption, quoting prior cases). The judiciary's "sole task is to ascertain the intent of Congress." *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987). Where Congress makes express provision for the preemptive effect of its handiwork, the inquiry is an "easy one." *English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990). Indeed,

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and where that provision provides a reliable indicium of congressional intent with respect to state authority ... there is no need to infer congressional intent to pre-empt from the substantive provisions of the legislation.

Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2618 (1992).

In reading the statute, due regard for federalism requires courts to "start with the assumption that the historic police powers of the states were not to be superseded by [a] federal act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Corp.*, 331 U.S. 218, 230 (1947). *See also Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-147 (1963)(preemption of state law must be based on an "unambiguous congressional mandate to that effect"). "This assumption provides assurance that 'the federal-state balance,' *United States v. Bass*, 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

This Court instructed that this presumption be especially strong in cases involving traditional state interests and access to justice. *See, e.g., English v. General Electric Co.*, 110 S. Ct. 2270, 2277 (1990)(even in the highly regulated field of nuclear facilities, the Court found no clear and manifest intent on the part of Congress . . . to preempt all state tort laws that *traditionally* have been available); *FMC Corp. v. Holliday*, 111 S. Ct. 403, 410 (1990); *Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145, 1156 n.13 (1988); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143-44 (1963).

Where preemption would eliminate access to justice, the Court in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) stated:

> This silence (of congress) takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without

comment, remove all means of judicial recourse for those injured by illegal conduct.

464 U.S. at 251. Justice Blackmun, dissenting in *Silkwood*, was equally emphatic on this point: "The absence of federal regulation governing the compensation of victims is strong evidence that Congress intended the matter to be left to the States." 464 U.S. at 264 n.7. Hence, this Court has refused to find preemption of state law remedies where federal law provided no alternative redress. *See United Construction Workers v. Laburnum Const. Co.*, 347 U.S. 656, 663-64 (1954).

2. Express preemption of any state "safety standard" does not clearly indicate congressional intent to eliminate state product liability law.

In this case, the Court "need only identify the domain expressly preempted" by the statutory language and narrowly construe its terms "in light of the presumption against the preemption of state police power regulations." *Cipollone*, 112 S. Ct. at 2618.

At issue is whether Congress intended by preempting "any safety standard"[4] to include product liability lawsuits. The meaning of "safety standard" in the text of §1392(d) is greatly clarified by Congress's parallel usage of the identical phrase earlier in the same sentence to refer to "Federal motor vehicle safety standard." The plain reading of this provision is that Congress intended to preempt state administrative regulations on the state level. *See, e.g., Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228, 1237 (N.D. Ind. 1987)(In construing a preemption clause, "Congress is presumed to use

[4]Petitioner insists upon the single the word, "standard," which may refer to common-law duties. Pet. Br. at 30. However, the cited authorities refer to "standards" in the context of standards of care, or reasonable person standard. None appears to use the more restrictive term "safety standard" used by Congress in §1392(d).

words in their ordinary sense unless it expressly indicates the contrary. . . . The usual understanding of regulations by rule, regulation, order, or *standard* will be regulation by administrative agency.")(Emphasis added.)

If Congress had intended to include tort liability within the preemptive scope of the provision, it would likely have employed a different term, one that more clearly includes common law liability suits. Indeed, "Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires." *Taylor v. General Motors Corp.*, 875 F.2d 816, 824 (11th Cir. 1989).[5]

It is not enough for Petitioner to argue that product liability lawsuits may have a regulatory effect. Pet. Br. at 33. Recognizing the weakness of textual support for their position, Petitioners attempt to construct a presumption *in favor* of preemption. Pet Br. at 19-22. Nevertheless, this Court has recently reaffirmed its presumption that "the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that is the clear and manifest purpose of Congress." *Cipollone*, 112 S. Ct. at 2617. Amicus submits that "safety standard" simply does not clearly and unambiguously denote tort liability actions.

This "plain statement doctrine" is more that a device of statutory construction. It is essential to the preservation of the proper federal-state balance. In *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), Justice O'Connor described the plain

[5]*See, e.g.*, Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. §1715z-17(d), -18(e) (Supp. V 1987)(preempting any "State constitution, statute, court decree, common law, rule, or public policy"); Copyright Act of 1976, 17 U.S.C. §301(a)(1982)(preempting rights "under the common law or statutes of any State"); Employee Retirement Income Security Act of 1974, 29 U.S.C. §1144(a), (c)(1)(1982)(preempting all state "law, decision, rules, regulations, or other State action having the effect of law").

statement doctrine: "[I]f Congress intends to alter the usual constitutional balance between States and the Federal government, it must make its intention to do so unmistakably clear in the language of the statute." *Id.* at 2401. *See also Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304, 2308 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); *Taffet v. Southern Co.*, 930 F.2d 847, 851 (11th Cir. 1991)("A federal court should not apply a federal statute to an area of traditional state concern unless Congress has articulated its desire in clear and definite language to alter the delicate balance between state and federal power.").

In a thoughtful and scholarly monograph, Judge Kenneth Starr has noted with approval "a growing culture of clarity in Supreme Court jurisprudence" in which the requirement of a clear statement of congressional intent to preempt fosters not only a healthy federalism, but also accountability on the part of Congress. Kenneth Starr, et al., The Law of Preemption: A Report of the Appellate Judges Conference of the American Bar Association 40 & 50-55 (1991) [hereinafter "Law of Preemption"].

3. Section 1397(k) expressly preserves common law liability.

Indeed, in the single provision of the Vehicle Act where Congress did make a clear and unambiguous reference to common law remedies, it did so to preserve them.

The meaning of this savings clause -- or in Justice Scalia's phrase, "antipre-emption provision," *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 295 (1987)(Scalia, J., concurring) -- is plain. As Arizona Justice Chief Feldman recently stated, "We find these words a reasonably clear congressional mandate. The inescapable conclusion is that Congress considered the preemption issue, addressed it in the text of the legislation, and rejected

preemption of state law tort claims like the one in this case." *Hernandez-Gomez v. Leonardo*, 1994 WL 593202 (Ariz., Nov. 1, 1994).

B. Express Preemption of State Regulatory "Safety Standards" Does Not Preempt State Product Liability Actions.

1. The indirect incentive for safety resulting from tort liability is fundamentally different from direct administrative safety regulation.

Key to petitioner's preemption analysis is the notion that administrative standards and common law tort liability are substantially equivalent methods of regulating unsafe conduct. For this reason, the argument goes, express preemption of state "standards," "regulations," "requirements," or similarly general terms should be construed as including tort liability as well as positive enactments. Pet. Br. at 30-33.

The fact is that these two tools available to society to enhance safety are dramatically different. And those differences are critical to preemption analysis. The essential difference is that tort law has as its goal the compensation of victims of wrongful conduct. It is therefore inherently retrospective. The jury determines whether past conduct was unreasonably dangerous or lacking in due care; it does not prescribe a safe design or proper conduct. The only "requirement" imposed upon the defendant is payment for the damage caused. *See Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1540-41 (D.C. Cir. 1984); *Burke v. Dow Chemical Co.*, 797 F. Supp. 1128, 1138 (E.D.N.Y. 1992)(noting that *Ferebee* "remains a leading case").

There is no prospective legal effect to a tort verdict. A subsequent plaintiff injured by the same product may not rely

on the prior verdict to establish liability; nor does a defense verdict in one case guarantee that the manufacturer will not be found liable in another case. The damage awards are measured by the injury suffered by the plaintiff, not by the amount necessary to force the defendant to alter its future conduct. Defendants can and do make the decision to pay damages without altering their products. In short, a liability verdict establishes no mandatory "safety standard."

The distinction between administrative regulation and the imposition of common law liability is clearly drawn and widely recognized, particularly in the field of product safety. *See* Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Studies 357 (1984). Reliance on regulation alone may well run counter to the very goals of the administrative scheme. *See* Frank J. Vandall, *Undermining Torts' Policies: Products Liability Legislation*, 30 Am. U. L. Rev. 673, 687 (1981)("Arguably, this type of legislation will discourage manufacturers from developing safer products, because it encourages manufacturers to lobby for weaker regulations rather than developing safer products.").

It is true that tort liability may exert an effect on manufacturer conduct. The expense of compensating victims of unsafe products gives an advantage in the marketplace to safer competitors and so provides an incentive for the manufacturer to invest in safety. This indirect impact is far removed from direct regulatory requirements imposed by a governmental agency.

As explained by Dean Calabresi, society seeks to prevent accidental injury through both general deterrence and specific deterrence. Guido Calabresi, The Costs of Accidents 68-129 (1970). Under general deterrence, decisions about accident avoidance measures are left to market processes. Strict liability merely ensures that the market price of a product reflects the true cost, including the costs arising from

unreasonable dangers in the product. "Thus, under a general deterrence regime, manufacturers, not government officials, make decisions about product safety." Richard C. Ausness, *Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems*, 39 Syracuse L. Rev. 897, 927 (1988). In contrast, specific deterrence mandates a particular choice determined by the legislature or an administrative agency. It is a raw exercise of state power that will reflect the political agenda of the regulator or other, noneconomic community values. *Id.*

This Court has recognized that Congress may permit indirect impact of tort liability while preempting direct regulation:

> We recognize that a claim for intentional infliction of emotional distress at issue here may have some effect on these decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers. . . . Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the preempted field.
>
> This result is strongly suggested by the decision in *Silkwood v. Kerr-McGee Corp.*

English v. General Electric Co., 110 S. Ct. 2270, 2278 (1990).

> The effects of *direct* regulation on the operation of federal projects are significantly more intrusive than the *incidental* regulatory effects of such an additional award provision. Appellant may choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation. We believe Congress may reasonably determine that *incidental regulatory*

pressure is acceptable, whereas direct regulatory authority is not.

Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185 (1988)(emphasis added).

As Justice Blackmun later described the import of these decisions, "The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory impact of the common law from positive enactments such as statutes and administrative regulations." *Cipollone*, *supra*, at 112 S. Ct. at 2628 (Blackmun, J., concurring in part, dissenting in part).

2. The statement in Garmon on the regulatory effect of tort liability does not transform product liability into a safety standard.

Petitioner relies on a passage in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959):

> Such regulation can be as effectively exerted through an award of damages as though some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

Amicus suggests that this passage, quoted in *Cipollone*, 112 S. Ct. at 2620 without qualification or context, invites greater reliance on *Garmon* than is warranted.

In *Garmon*, an employer filed suit in California state court against a labor union that had picketed plaintiff's lumber business. The court assessed tort damages under state law for unfair labor practices. The Supreme Court reversed, holding that the claim should have been filed first with the National Labor Relations Board. Justice Frankfurter, writing for the majority, announced what has become known as the *Garmon*

rule: "When activity is arguably subject to section 7 [concerted activities] or section 8 [unfair labor practices] of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." *Id.* at 245.

The Congressional scheme did not simply preempt state regulation of certain labor activities; it completely deprived the courts -- state and federal -- of jurisdiction in favor of the NLRB, the "special tribunal" that Congress set up for this purpose. *Id.* at 242.

As this Court later explained, *Garmon* was chiefly concerned with establishing the remedial scheme provided by the National Labor Relations board in place of state remedies "by ensuring that the primary responsibility for interpreting and applying this body of law remained with the NLRB. . . based on the primary jurisdiction rationale." *Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54*, 468 U.S. 491, 502 (1984). As one district court has stated

> *Garmon* is better understood as [concerned] with the primary jurisdiction of the NLRB and the exclusive application of its remedial scheme. The Court's discussion of pre-emption of state common law claims must be read with that in mind.

Wood v. General Motors Corp., 673 F. Supp. 1108, 1118 n.14 (D. Mass. 1987), rev'd, 865 F.2d 395 (1st Cir. 1988).

Even if *Garmon* is viewed as a preemption case, the passage merely restates the settled proposition that where the Congress intended to occupy the field completely, state regulation -- direct or indirect -- is ousted. And even in this context of field preemption, the Court carefully conditioned its ouster of state law on the assurance that access to justice be assured through alternative federal remedies. The majority opinion emphasized the fact that NLRA established a set of

procedures and remedies in place of the state law remedies displaced by the Act. 359 U.S. at 243. The concurring justices cautioned that, where Congress has not provided a remedy for tortious conduct, "there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated." *Id.* at 252 (Harlan, J., concurring), quoting *United Construction Workers v. Laburnum Const. Co.*, 347 U.S. 656, 665 (1954).

In cases where Congress has neither occupied the field nor provided alternative remedies, *Garmon* has little application.

II. THE VEHICLE ACT DOES NOT OUST PRODUCT LIABILITY THROUGH "CONFLICT" PREEMPTION.

A. Where Congress Has Made Express Provision for the Preemptive Scope of a Statute, Courts May Not Disregard Congressional Intent to Imply Broader Preemption.

Part I of Petitioner's Brief presents this Court with a striking manifesto for judicial power. Petitioner asserts that "conflict" preemption "stands quite apart from any congressional intent to displace state authority." Pet. Br. at 18. Indeed, a court may hold state law to be preempted despite "a broad savings clause that *explicitly* and sweepingly preserves state authority." Pet. Br. at 23. All that is required is judicial determination that the state law conflicts with the federal law, or policy. This, Petitioners assert, "follows from the Supremacy Clause's mandate regarding the primacy of federal regulatory policy (without separate proof of congressional intent to displace state authority)." Pet. Br. at 26.

This Court has steadfastly insisted that congressional intent is the touchstone of preemption. Moreover, disregard

of even the express intent of Congress poses grave threats to federalism. This Court in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985), held that the integrity and sovereignty of the states is safeguarded primarily by their representation in Congress. As Justice O'Connor has stated:

> By declining to infer preemption in the face of congressional ambiguity, the Court is not interposing a judicial barrier to Congress' will in order to protect state sovereignty -- an interposition that would violate *Garcia* -- but is instead furthering the spirit of *Garcia* by requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress, through the explicit exercise of its lawmaking power to that end.
>
> * * *
>
> Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.

Gregory v. Ashcroft, 111 S. Ct. at 2403.

Judge Starr has pointed out the dangers of this course urged by Petitioners:

> When courts preempt state laws without explicit congressional guidance, unelected and unaccountable officials substitute their preferences for those of the citizens of local communities. Unguided preemption thus erodes our national commitment to the process of self-governance . . . When judges preempt state laws in the abence of explicit congressional guidance, they in effect assume a legislative role without accepting

> legislative responsibility. [In addition] the overarching guarantee of "Our Federalism" is defeated.

Starr, Law of Preemption at 48-49.

This Court has warned: "As the history of the Lochner era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). In short, "courts should not assume the role which our system assigned to Congress." *Pacific Gas & Elec. Co. v. Energy Resources Comm'n.*, 461 U.S. 190, 223 (1983).

B. State product liability law is not in conflict with FMVSS 211.

1. It is not impossible for manufacturers to comply with both FMVSS 211 and state liability rules.

There is significantly less to Petitioner's conflict preemption argument than initially meets the eye. The fact is that there is no conflict between the FMVSS 121 and state tort law. FMVSS 121 merely renders the prescribed stopping distances inapplicable to trucks and trailers. As a result, manufacturers may install antilock devices, or they may choose not to. It is not impossible to comply with the federal standard while remaining subject to state product liability actions. This is essentially the same choice they had before the standard was written. Petitioner would accord preemptive effect, not to the standard, but to the decision not to impose a standard. At bottom, Petitioners ask for field preemption.[6]

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[6]It is ironic that Petitioner seeks to confer supemacy status on federal regulatory policy. NHTSA policy, as originally reflected in FMVSS 211, was to require antilock brakes. It withdrew that requirement only when ordered to do so by the Court in *Paccar Inc. v. NHTSA*, 573 F.2d 632 (9th Cir. 1978). See Resp. Br. at Counterstatement of Facts.

This Court has rejected the contention that tort law necessarily "conflicts with the federal remedial scheme." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). To the contrary, in that case:

> Congress did not believe that it was inconsistent to vest the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to recover for injuries caused by nuclear hazards.

Id. at 258.

Justice Blackmun dissented on the issue of punitive damages, but agreed that:

> Whatever compensation standard a State imposes, whether it be negligence or strict liability, a licensee remains free to continue operating under federal standards and to pay for the injury that results. . . . Compensatory damages therefore *complement the federal regulatory standards, and are an implicit part of the federal regulatory scheme*.

Id. at 264 (Blackmun, J., dissenting)(emphasis added).

Courts have also harmonized product liability with federal regulatory standards by viewing the latter as "a floor, not a ceiling." *See Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1543 (D.C. Cir. 1984); *Rucker v. Norfolk & Western R.R.*, 396 N.E.2d 534, 537 (Ill. 1979); *Stevens v. Parke, Davis & Co.*, 507 P.2d 653, 661 (Cal. 1973); *Raymond v. Riegel Textile Corp*, 484 F.2d 1025 (1st Cir. 1973); *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968)("It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability.").

2. State product liability does not conflict with the federal "option" to use antilock brakes.

Petitioners seek to transform FMVSS 121 into a positive guarantee of the option not to install antilock devices. Pet. Br. at 36-37. In fact, NHTSA simply decided not to require them.

In this respect, the issue is similar to that presented in *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987). That case involved an asserted conflict preemption between a state statute which required employers to provide a benefit to pregnant employees, and the federal Pregnancy Disability Act, in which Congress declined to require special benefits. Justice Marshall suggested it would be anomalous to read a federal statute that does not require the states to be more generous as prohibiting them from doing so. Significantly, he reconciled the statutes by concluding that the federal act represented a "floor, not a ceiling."

Petitioners insist that "agency *failure* to regulate may have preemptive force." Pet. Br. at 32. That principle applies only where Congress has occupied the field. Otherwise, as this Court has stated, "unenacted approvals, beliefs and desires are not laws" under the Supremacy Clause. *Puerto Rico Dept. of Consumer Affairs v. Ilsa Petroleum Corp*, 485 U.S. 495, 501 (1988). In this case, Petitioners truly seek to "leave behind a preemptive grin without a regulatory cat." *Id.* at 504.

C. Product Liability Does Not "Stand As An Obstacle" To The Purposes And Objectives of the Vehicle Act.

To establish conflict preemption, Petitioners rely on a passage drawn from *Hines v. Davidowitz*, 312 U.S. 52 (1941)(state law is preempted if it "stands as an obstacle to

the accomplishment and execution of the full purposes and objectives of Congress"). Pet. Br. at 18. Similarly, Petitioners look to *International Paper Co. v. Ouellette*, 479 U.S. 481, 492-94 (1987) for the proposition that not even a savings clause preserves a state law "that would subvert a federal statutory or regulatory scheme." Pet. Br. at 23.

Petitioner ignores that fact that federalism and access to justice are distinguishing factors in those cases that render them inapposite here.

In *Hines*, the Court preempted an Alien Registration Act adopted by Pennsylvania on the basis of field preemption. Significantly, Justice Black clearly announced that the basis of preemption was that

> this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.

312 U.S. at 67-68. (Emphasis added).

This distinction was underscored in *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), which involved local regulation of blood plasma. Justice Marshall, for the Court, noted :

> [I]n the seminal case of *Hines v. Davidowitz*, [312 U.S. 52 (1941)], the Court inferred an intent to preempt from the dominance of the federal interest in foreign affairs because 'the supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution,' . . . and the regulation of that field is intimately blended and intertwined with responsibilities of national government. Needless to say, those factors are absent here. Rather, as we have

stated, the regulation of health and safety matters is primarily and historically, a matter of local concern.

Id. at 719.

Freightliner's reliance on *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), is similarly misplaced. *Ouellette*, despite its discussion of preemption, is not a preemption case at all, but a conflict of law case.[7] To the extent that it has any relevance, *Ouellette* is authority *against* Petitioner's position. First, the Court had occasion to look to the policies and purposes of the statute only because "the Act itself does not speak directly to the issue." *Id.* at 493. Second, *Ouellette*, like *Hines*, involved a subject matter -- interstate water pollution -- where national interest predominates. *Id.* at 492. Finally the *Ouellette* Court conditioned its holding on the fact that the result "does not leave respondents without a remedy." *Id.* at 497.

III. CONGRESS LACKS THE AUTHORITY TO PREEMPT THE COMMON LAW RIGHT OF ACCESS TO JUSTICE FOR REDRESS OF WRONGFUL INJURY.

Even if Congress intended to preempt state tort law, this Court's inquiry is not at an end. Congress may not act beyond the authority granted to it in the Constitution. Hence Congress may preempt state law only "when acting within constitutional limits." *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987). Regulation of vehicle safety is unquestionably within the authority of Congress. However, Amicus submits, regulation in a manner

[7] In *Ouellette*, landowners brought a state law nuisance action against a paper mill, alleging pollution of a resort lake. At issue was not whether the Federal Clean Water Act preempts state tort actions; the Act expressly preserved those remedies. Rather, the issue was whether to apply the law of the landowners' state or the state of the source of the pollution. The Court held the Act required the latter. 479 U.S. at 497.

which purports to eliminate the state law right to a remedy for tortious injury is beyond the constitutional limits.

A. Affording the Right to Seek Redress for Injury Is a Core Function of the States.

The common-law right to seek redress in the courts for wrongful injury holds a special place in our civil justice system. Common-law rights were not created by legislatures and are not a matter of legislative grace. Indeed, they preceded even the Constitution. Lord Coke traced this right to the Magna Carta.[8]

One of this Court's earliest pronouncements declared that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). This right of access to justice is so fundamental that this Court has located "the duty of every State to provide, in the administration of justice, for the redress of private wrongs" in the Due Process Clause of the Fourteenth Amendment. *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).

This Court has not departed from these principles. Justice Powell observed that the drafters of the Due Process Clause intended to give Americans "the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'" *Ingraham v. Wright*, 430 U.S. 651, 674 (1977), quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). In *Ingraham*, which addressed the corporal punishment of school children,

[8] Every Subject may take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without denial, and speedily without delay.

Coke, Second Institute 55-56 (4th ed. 1671).

the Court indicated that lack of notice or hearing might well have violated due process but for the fact that aggrieved parties had access to the common-law tort remedy for excessive punishment. *Id.* at 674. This result is consistent "with the substantive view that the fourteenth amendment encompasses the same liberties as those protected by the common law." *Id.* at 679 n.47.

The right to a remedy is expressly guaranteed by thirty-seven state constitutions. Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U.L. Rev. 579, 615 n.218 (1981); Note, *Constitutional Guarantees of a Certain Remedy*, 49 Iowa L. Rev. 1202 (1964).

The importance of this right is greatly magnified by the fact that access to justice is intimately bound up with the right to trial by jury. The former colonists valued the right to trial by jury in civil cases so highly that they incorporated it into the basic charter of government.[9] Indeed, it was only after a commitment was made to include this right in a bill of rights that the Constitution was ratified at all. *See* Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 156-60 (1991). "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486

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9 In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

U.S. Const., amend VII.

(1953).[10] "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption," *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979)(Rehnquist, C.J., dissenting), and the right to trial by jury is guaranteed by virtually every state constitution.

The continued vitality of these state constitutional guarantees is reflected in the decisions of state supreme courts striking down limitations on damages in tort actions as violative of those rights. *See, e.g., Moore v. Mobile Infirmary Assoc.*, 592 So. 2d 156 (Ala 1991)(right to jury trial); *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987) (right to jury trial and right of access to courts); *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988) (right to jury trial and right to remedy); *Lucas v. United States*, 757 S.W.2d 686 (Tex. 1988) (open courts guarantee); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989)(right to jury trial).

B. The Tenth Amendment Withholds From Congress the Authority to Close State Courts to Those Seeking Redress for Wrongful Injury.

Given the fundamental nature of the right to seek legal redress for injury and the importance of the function of the States in affording that right, it flows from the structure of our federal system that the authority of the federal

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10 Describing the right to trial by jury as "a great constitutional right," the Court stated that "it is only in exceptional cases and for specific causes that a party may be deprived of it." Grand Chute v. Winegar, 82 U.S. 373, 375 (1872). *See also* Bailey v. Central Vermont Ry., 319 U.S. 350, 354 (1943) ("The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence."); Lyon v. Mutual Benefit Assoc., 305 U.S. 484, 492 (1939) ("It is essential that the right to trial by jury be scrupulously safeguarded.").

government to curtail that right is limited. One constitutional limit on federal preemptive action is the Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.[11]

The applicability of this provision is made apparent by Petitioners' view of the operation of the Vehicle Act:

> But in cases of conflict preemption, as here, federal law *invalidates* the standard of conduct that defines the alleged "illegality," leaving plaintiff with a complaint seeking recovery for conduct that is not tortious.

Pet. Br. at 24.

In other words, Petitioners would confer upon Congress the authority to change state tort law. Or more precisely, the authority to compel state courts to enforce the tort rule devised by Congress.

Such authority is clearly beyond the authority of Congress, as this Court recognized in the landmark decision of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938):

> There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution

[11]This provision should be read together with the Ninth Amendment:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const., amend. IX.

> purports to declare such a power upon the federal courts.

Id. at 78. Justice Brandeis indicated the Tenth Amendment boundary by noting that in purporting to declare common law, "this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." *Id.* at 80. *See also Griffin v. Breckenridge*, 403 U.S. 88, 102, 104 (1971)(dicta indicate that Congress may not have the power under the commerce clause or thirteenth and fourteenth amendments to federalize completely such traditional areas of common law as the law of torts).

More recently, this Court addressed the constitutionality of the Price-Anderson Act, which imposed a cap on tort damages recoverable due to a nuclear plant accident. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 86-87, 91-93 (1978). The Court suggested that abolition of the common law right to a tort remedy would violate due process. The Court upheld the statute because it provided a "panoply of remedies and guarantees," including imposition of a form of strict liability and an expedited recovery scheme. *Id.* at 86-88 and 91-93. As Justice Marshall later remarked:

> [O]ur cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, . . . at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.

PruneYard Shopping Center v. Robins, 447 U.S. 74, 93-94 (1980)(Marshall, J., concurring).

The Court gave substantive content to the Tenth Amendment in *National League of Cities v. Usery*, 426 U.S. 833 (1976), holding that Congress could not impose the federal minimum wage requirement on the states as

employers. The decision advanced the notion that certain essential functions of a State are so "integral" to statehood that they may not be supplanted by federal law.

> Congressional enactments which may be fully within the grant of legislative authority contained in the commerce clause may nonetheless be invalid because found to offend against the right to trial by jury contained in the Sixth Amendment, or the Due Process Clause of the Fifth Amendment. . . . This court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce . . . The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function in a federal system.

Id. at 854-55.

The Court overruled *National League of Cities* a decade later in *Garcia v. San Antonio Metropolitan Transit Authority*. 469 U.S. 528 (1985). The *Garcia* Court did not dismantle the system of federalism, however. Rather the majority found that the task of defining "traditional government functions" of the States was unworkable. More importantly, the majority concluded that the States do not need substantive protection under the Tenth Amendment; they can fully protect their interests by virtue of their representation in Congress. *Garcia* reasoned that the States "are more properly protected by the procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552.

This Court has consistently emphasized the importance of federalism, not as the mere absence of federal interference, but as a positive value of self-government.

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenious society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory v. Ashcroft, 111 S. Ct. at 2399 (1991).

More significantly, this Court has recognized that the "procedural safeguards" relied upon in *Garcia* are not sufficient in every instance of federal interference with state functions. *New York v. United States*, 112 S. Ct. 2408 (1992) involved the Low-Level Radioactive Waste Policy Amendments Act of 1985, which provided monetary incentives for states to develop waste sites that comply with federal goals, and commanded that where there is no appropriate disposal site, states must take title to the waste.

The Court stated, "The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power." *Id.* at 2418. The Court upheld the incentives, but declared that the federal government may not "commandeer the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 2420.[12]

> The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize

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[12]Two district courts, following *New York*, have recognized limits on congressional authority to "commandeer" state officials to enforce the Brady Act.. *Pritz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994); *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994).

> Congress to regulate state governments' regulation of interstate commerce.

Id. at 2423.

In essence, this is what Petitioners seek: a congressional command to the states to close the doors of their courts to injured victims of unreasonably dangerous vehicles. As Judge Starr points out, "Federalism Counts." Kenneth Starr, The Law of Preemption at 40. And he adds "The Tenth Amendment most directly recognizes the states' crucial role in the governance of our federal system." *Id.* at 43.

CONCLUSION

For the foregoing reasons, Amicus urges this Court affirm the judgment of the court of appeals.

Respectfully submitted,

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